UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODNEY BARBER,)
Plaintiff,)
) C.A. No. 05-390-L
v.)
)
VERIZON NEW ENGLAND, *et al.*,)
Defendants.)

MOTION TO DISMISS OF DEFENDANTS
LORNA DEPLITCH AND JOSEPH CONWAY

Defendants, Lorna Deplitch and Joseph Conway, hereby move to dismiss Plaintiff's Verified Complaint.

In support of this motion, the Court is respectfully referred to the accompanying memorandum.

LORNA DEPLITCH, and
JOSEPH CONWAY,

By Their Attorney,

John D. Doran

John D. Doran (#6415)
EDWARDS & ANGELL, LLP
2800 Financial Plaza
Providence, RI 02903
(401) 274-9200
(401) 276-6611 (fax)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 11th day of October, 2005, I caused a true copy of the within Motion To Dismiss of Defendants, Lorna Deplitch And Joseph Conway to be served by first class mail, postage prepaid, to the following counsel of record:

Bruce P. Gladstein, Esq.
750 East Avenue
Pawtucket, RI 02860

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODNEY BARBER,	)	
Plaintiff,	)	
	)	C.A. No. 05-390-L
v.	)	
	)	
VERIZON NEW ENGLAND, *et al.*,	)	
Defendants.	)	

DEFENDANTS LORNA DEPLITCH'S AND JOSEPH CONWAY'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants, Lorna Deplitch ("Mrs. Deplitch") and Joseph Conway ("Mr. Conway") jointly, the "Individual Defendants"), submit this Memorandum in support of their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). Plaintiff's Verified Complaint alleges three counts and should be dismissed in its entirety as to the Individual Defendants. Count II fails because Plaintiff failed to exhaust his administrative remedies with respect to the Individual Defendants. Counts I and II both fail because Plaintiff has not alleged that either of the Individual Defendants committed any act in violation of either the Rhode Island Civil Acts and/or the Rhode Island Fair Employment Practices Act. Count III simply alleges vicarious liability against Verizon New England, Inc. ("Verizon") and does not purport to state a claim against the Individual Defendants.

Facts

This action arises out of Verizon's decision to terminate plaintiff Rodney Barber ("Plaintiff" or "Barber") after Verizon learned that he traveled to Las Vegas while on a paid disability leave. Plaintiff claims that this decision was motivated by discriminatory animus against Plaintiff because of his alleged disability, Hepatitis C. Plaintiff filed a charge of discrimination with the Rhode Island Commission For Human Rights on or about March 22,

2004. Exhibit A.[1] Plaintiff did not name either of the Individual Defendants as a party in his charge. Plaintiff then filed a Verified Complaint in the Superior Court for the State of Rhode Island on or about August 18, 2005. This was the first time that the Individual Defendants were named as parties to the action. Verizon and the Individual Defendants removed this action to the United States District Court based on diversity of citizenship on September 13, 2005.

Count I of Plaintiff's Verified Complaint alleges disability discrimination by Verizon, and Verizon only, in violation of the Rhode Island Civil Rights Act. Count II alleges disability discrimination by Verizon, and Verizon only, in violation of the Rhode Island Fair Employment Practices Act. Count III alleges Verizon is vicariously liable pursuant to the principle of "respondent (sic) superior" due to the actions of the Individual Defendants as they were acting within the scope of their employment. Nowhere, however, does Plaintiff ever articulate anywhere in his Complaint the alleged discriminatory actions of the Individual Defendants.

Count II fails because Plaintiff failed to exhaust his administrative remedies with respect to the Individual Defendants. Counts I and II both fail with respect to the Individual Defendants because Plaintiff has not alleged that they engaged in any wrongdoing, much less any discriminatory conduct against the Plaintiff. Count III does not apply to the Individual Defendants. Accordingly, the Complaint should be dismissed in its entirety with respect to the Individual Defendants.

[1] The Court may consider the charge of discrimination filed with the Rhode Island Commission for Human Rights in rendering a decision on the motion to dismiss. Beddal v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998)("When, as now, a complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).")

II. Argument

A. Plaintiff Failed To Exhaust His Administrative Remedies As To The Individual Defendants and Therefore Count II Should Be Dismissed.

A plaintiff bringing a civil action pursuant to the Fair Employment Practices Act is first required to file a charge with the Rhode Island Commission for Human Rights naming the alleged discriminators. Ward v. City of Pawtucket Police Department, 639 A.2d 1379 (R.I. 1994). The rules and regulations for the Commission state:

> A charge shall contain, as a minimum, the following: (a) the full name and address of the person making the charge. (b) *the full name and address of the person against whom the charge is made*. . . (emphasis added).

Rules and Regulations of the Rhode Island Commission for Human Rights, 4.04. Plaintiff did not name the Individual Defendants as required by the Commission's regulations. In fact, Plaintiff did not even mention Mr. Conway in the narrative section of his charge.

While Rhode Island courts have not specifically addressed the issue of a plaintiff's failure to name a party in an administrative charge, it is well established that Rhode Island courts look to federal courts for guidance in interpreting employment discrimination statutes. Newport Shipyard, Inc. v. Rhode Island Commission for Human Rights, 44 A.2d 893 (R.I. 1984). Federal decisions on this issue consistently hold that the administrative charge must give the unnamed party notice of the allegation and an opportunity to engage in conciliation. See, e.g., Russell v. Enterprise Rent-A-Car Company, 160 F.Supp 2d. 239 (D.R.I 2001); Lipson v. Johnson & Wales University, 1997 WL 576397 (D. R.I. 1997) ("the general rule is that before a plaintiff can sue a defendant under Title VII in federal court, the plaintiff must first file an administrative charge with the EEOC naming the defendant as an alleged discriminator"). Plaintiff simply has failed to do so here. His decision now to belatedly name the Individual Defendants as parties in this litigation is nothing more than an attempt to circumvent the exhaustion requirements of the Fair Employment Practices Act.

Count II should be dismissed as to the Individual Defendants.

B. Plaintiff Has Failed To State A Claim Against The Individual Defendants as to Both Counts I and II.

In addition to Plaintiff's failure to exhaust his administrative remedies with respect to the Individual Defendants, Plaintiff fails to allege anywhere in his Complaint that either of the Individual Defendants, took any action against him in violation of either the Civil Rights Act (Count I) or the Fair Employment Practices Act (Count II). Plaintiff specifically alleges that Verizon, as a corporate entity, violated the Civil Rights Act and Fair Employment Practices Act, but nowhere asserts the same allegation with respect to the Individual Defendants. Verified Complaint, ¶¶ 23 and 27.

Given Plaintiff's failure to make any substantive allegations against the Individual Defendants as to either of the two Counts[2] asserted against them, the Verified Complaint should be dismissed in its entirety with respect to both Ms. Deplitch and Mr. Conway.

III. Conclusion

The Individual Defendants' addition to this case adds nothing, as demonstrated by the fact that neither of them was named in Plaintiff's administrative charge and the Complaint itself is

[2] Plaintiff alleges in Count III that Verizon is responsible for the actions of the Individual Defendants because they were acting within the scope of their employment. Verified Complaint, ¶ 32. This Count is directed at Verizon only and not the Individual Defendants.

devoid of any substantive allegations as to either of them. For the foregoing reasons, Defendants Ms. Deplitch and Mr. Conway both respectfully request the Verified Complaint be dismissed as to the Individual Defendants.

LORNA DEPLITCH, and
JOSEPH CONWAY,

By Their Attorney,

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